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INFORMATION & PRIVACY
COMMISSIONER
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Order F12-01

EMERGENCY AND HEALTH SERVICES COMMISSION OF BRITISH COLUMBIA

Michael McEvoy
A/Senior Adjudicator

January 17, 2012

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Summary: CUPE requested records related to a labour dispute between BC Paramedics and the Emergency and Health Services Commission. The Commission disclosed some records but withheld other information under ss. 12, 13, 14 and 22 of FIPPA. The A/Senior Adjudicator found the records for which the Commission claimed s. 14 were subject to solicitor-client privilege. The Commission was also required to refuse to disclose the records for which it claimed s. 22 because disclosure of that information would be an unreasonable invasion of the privacy of certain employees. While the A/Senior Adjudicator determined that the Commission had properly applied ss. 12 and 13 to a number of records, he ordered the Commission to disclose other withheld information because it did not reveal the substance of cabinet deliberations nor did it reveal recommendations or advice by or for a public body.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 12(1), 13(1), 14 and 22(1).

Authorities Considered: B.C.: Order 01-53, [2001] B.C.I.P.C.D. No. 56; Order F10-04, [2010] B.C.I.P.C.D. No. 6; Order 02-38, [2002] B.C.I.P.C.D. No. 38; Order 01-02, [2001] B.C.I.P.C.D. No. 2; Order F08-17, [2008] B.C.I.P.C.D. No. 30; Order 01-15, [2001] B.C.I.P.C.D. No. 16; Order F07-23, [2007] B.C.I.P.C.D. No. 38; Order F10-15, [2010] B.C.I.P.C.D. No. 24; Order F06-16, [2006] B.C.I.P.C.D. No. 23.

Cases Considered: *B. v. Canada,* [1995] 5 W.W.R. 374 (BCSC); *College of Physicians of B.C. v. British Columbia (Information and Privacy Commissioner)*, [2002] BCCA 665; *Babcock v. Canada (Attorney General)*, 2002 SCC 57; *Aquasource Ltd. v. British Columbia (Information and Privacy Commissioner)*, [1998] B.C.J. No. 1927 (C.A.).

INTRODUCTION

[1] The Canadian Union of Public Employees, Local 873, ("CUPE") requested information under the *Freedom of Information and Protection of Privacy Act* ("FIPPA") from the Emergency and Health Services Commission of British Columbia ("Commission") relating to a labour dispute between BC Paramedics and the Commission. The Commission located 267 pages of records responsive to the request.[1] It disclosed some of the information in these pages, but withheld the rest, primarily under ss. 12 (disclosure would reveal the substance of cabinet confidences), 13 (disclosure would reveal policy advice, recommendations or draft regulations) or 14 (solicitor-client privilege). The Commission also withheld a small number of passages in a few records on the basis that disclosure of those would be an unreasonable invasion of third party privacy (s. 22).

[2] CUPE asked the Office of the Information and Privacy Commissioner ("OIPC") to review the Commission's decision. The Commission asked that the OIPC notify the Ministry of Health ("Ministry") of this inquiry because among other things the Ministry created the majority of the records at issue. The OIPC agreed and notified the Ministry about the inquiry as an "appropriate" person under s. 54(b) of FIPPA. The Commission made submissions on behalf of itself and the Ministry. The inquiry closed June 3, 2011. Afterward, I identified a need to clarify the records in issue, and I referred the matter back to the parties on September 9, 2011 with the assistance of an OIPC investigator. The Investigator amended her Fact Report clarifying the records at issue in this inquiry.

ISSUES

[3] The issues before me are:

1. Whether the Commission is authorized by s. 12(1) to refuse access to the certain information in the records.

2. Whether the Commission is authorized by s. 13(1) to refuse access to the certain information in the records.

3. Whether the Commission is authorized by s. 14 to refuse access to the certain information in the records

4. Whether the Commission is required by s. 22(1) of FIPPA to withhold certain information in dispute.

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[1] The Commission has numbered the records and I will use that numbering system to identify the records at issue in this Order.

DISCUSSION

[4] **Background**—CUPE represents BC paramedic workers who commenced strike action against the Commission in April 2009. The Legislative Assembly passed legislation in November 2009 requiring the workers to return to work. Concurrent with this back to work action the Provincial Government also appointed Chris Trumpy to head an industrial inquiry commission into the labour dispute.

[5] Shortly thereafter, CUPE wrote the Commission requesting the following records:

- All documents concerning or touching upon legislation, drafts of legislation, or proposed legislation regarding BC ambulance paramedics including, but not limited to the Ambulance Services Collective Agreement Act from January 1, 2009 to present;

- All documents concerning or touching upon the labour dispute between the British Columbia Ambulance Service and/or the Emergency & Health Services Commission and the BC Labour Relations Board, except for legal submissions to the BC Labour Relations Board cc'ed to CUPE 873 or its legal counsel; and

- All documents concerning or touching upon the appointment of an industrial inquiry commission pursuant to the BC ambulance paramedics including, but not limited to, the appointment of Chris Trumpy.

[6] As noted, the Commission found 267 records responsive to the applicant's request. The Commission withheld some in their entirety, partially severed many others and released a smaller number in their entirety.

[7] **Solicitor-Client Privilege**—I begin my analysis by considering the Commission's application of s. 14 of FIPPA to certain records.

[8] Section 14 of FIPPA states:

> The head of a public body may refuse to disclose to an applicant information that is subject to solicitor client privilege.

[9] This provision encompasses two kinds of privilege recognized at law: legal professional privilege (sometimes referred to as legal advice privilege) and litigation privilege.[2] The Ministry argues that legal advice privilege applies here.

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[2] See for example, Order 01-53, [2001] B.C.I.P.C.D. No. 56.

[10] Decisions of this office have consistently applied, as I do here, the test for legal advice privilege at common law. Thackray J. (as he then was) put the test this way:[3]

> [T]he privilege does not apply to every communication between a solicitor and his client but only to certain ones. In order for the privilege to apply, a further four conditions must be established. Those conditions may be put as follows:
>
> 1. there must be a communication, whether oral or written;
> 2. the communication must be of a confidential character;
> 3. the communication must be between a client (or his agent) and a legal advisor; and
> 4. the communication must be directly related to the seeking, formulating, or giving of legal advice.
>
> If these four conditions are satisfied then the communication (and papers relating to it) are privileged.
>
> It is these four conditions that can be misunderstood (or forgotten) by members of the legal profession. Some lawyers mistakenly believe that whatever they do, and whatever they are told, is privileged merely by the fact that they are lawyers. This is simply not the case.

[11] The burden is on the Commission, under s. 57(1) of FIPPA, to show why the applicant has no right of access to the withheld information in the records (as well as the information at issue under s. 12 and 13 that follow).

[12] There are three groups of records at issue concerning the application of s. 14. The first is a series of emails involving Commission employees and Legal Services Branch ("LSB") lawyers.[4] My review of these records discloses that privilege applies to all of them. Some of these emails are communications between LSB lawyers and employees of the Commission giving legal advice.[5] Two emails are from Commission employees to LSB lawyers seeking legal advice.[6] The remaining emails are between employees of the Commission that reference the legal advice at issue.[7] Since the Commission employees' communications are internal client communications about the legal advice, this does not result in the waiver of the claimed privilege.

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[3] *B. v. Canada,* [1995] 5 W.W.R. 374 (BCSC).

[4] Lawyers employed by the Attorney-General who act as counsel for client ministries of government.

[5] Records 119, 121, top of 122, top of 123.

[6] Records 120, bottom two severances of 122 and bottom of 123.

[7] Records 29, 118, 124 and 125.

[13] The second category of records relates to instructions conveyed by Ministry staff to Legislative Counsel concerning draft legislation relating to the paramedics.[8] The Commission argues those instructions were confidential and the direct product of a solicitor-client relationship between the Attorney General and Her Majesty in Right of the Province of British Columbia. I would agree. In doing so, I apply previous orders[9] that have found the relationship between Legislative Counsel and a client ministry, relating to the drafting of legislation, to be privileged under s. 14.

[14] The third group of records at issue[10] is draft legislation that has been "redlined". This means that the draft contains markings that denote where legislative counsel believes certain parts should be deleted, added or modified. In Order F10-04, I found that such "redlining" constitutes legal advice because it "encapsulate[s] counsel's confidential advice, on the face of the record, as to recommended statutory amendments." This is equally applicable here and I therefore conclude this last group of records to which the Commission applies s. 14 is subject to solicitor-client privilege.

[15] In summary, all of the information to which the Commission applied s. 14 of FIPPA is subject to solicitor-client privilege.

[16] **Cabinet Confidences**—I will next consider those records for which the Commission applies s. 12. Section 12 of FIPPA requires a public body to withhold information that would reveal the substance of Cabinet deliberations. The relevant parts of s. 12 read as follows:

> 12(1) The head of a public body must refuse to disclose to an applicant information that would reveal the substance of deliberations of the Executive Council or any of its committees, including any advice, recommendations, policy considerations or draft legislation or regulations submitted or prepared for submission to the Executive Council or any of its committees.
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> (2) Subsection (1) does not apply to
>
> (c) information in a record the purpose of which is to present background explanations or analysis to the Executive Council or any of its committees for its consideration in making a decision if
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> (i) the decision has been made public,
>
> (ii) the decision has been implemented, or
>
> (iii) 5 or more years have passed since the decision was made or considered.

[8] Records 57 and 58.
[9] See for example, Orders F10-04, [2010] B.C.I.P.C.D. No. 6 and Order 02-38, [2002] B.C.I.P.C.D. No. 38.
[10] Records 6-16 and 42, 45 and 46.

[17] The Supreme Court of Canada's decision in *Babcock v. Canada (Attorney General)* outlines the purposes underlying the common law principle of cabinet confidentiality.[11] In addition, the British Columbia Court of Appeal in *Aquasource Ltd. v. British Columbia (Information and Privacy Commissioner*)[12] considered the principles for interpreting ss. 12(1) and (2) of FIPPA and subsequent orders such as Order 01-02[13] and Order 02-38[14] discussed them further. The Court in *Aquasource* found that s. 12(1) "must be read as widely protecting the confidence of Cabinet communications." It also found that the "substance of deliberations" in s. 12(1) refers to "the body of information which Cabinet considered (or would consider in the case of submissions not yet presented) in making a decision, including the type of information specifically there enumerated." Relevant to this case is that the list of enumerated information in s. 12 includes draft legislation or regulations. The gist of Order F07-23 and other similar cases is that if disclosure of the information at issue, in whatever record it appears, reveals the draft legislation or regulations considered by cabinet, then s. 12 protects it.

[18] In this case the Commission applies s. 12 to email exchanges involving it and Ministry employees, briefing documents authored by Ministry or Commission employees and, in one case, a meeting agenda. In my view, the Commission properly withheld most of the material at issue under s. 12 of FIPPA. In these instances the records disclose legislation or regulations in draft or describe the draft legislation or regulations in the course of advice, recommendations, or policy analysis provided by Ministry or Commission employees.

[19] The Commission has proven the draft legislation and regulations were considered by Cabinet or its Committees. The Commission provided me the *in camera* minutes of the February 3, 2009 meeting of the Legislative Review Committee ("LRC") confirming that the LRC discussed the draft *Emergency and Health Services Act* ("EHSA") on that date. Additionally, the Commission proffered the February 6, 2009 Record of Decision in relation to the draft legislation by the LRC on February 3, 2009. Section 1(c) of the Executive Council Regulation, B.C. Reg. 229/2005, designates the LRC as a committee of Cabinet for the purposes of s. 12 of FIPPA. The Commission also provided affidavit evidence that the Agenda and Priorities Committee ("APC"), a designated Cabinet committee, considered draft regulations related to the *Emergency and Health Services Act.* The Commission says the APC approved that regulation through the process of a "corridor order", which means that a Cabinet Minister was given authority to sign the regulations on Cabinet's behalf. The Commission provided me a copy of that corridor order.

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[11] *Babcock v. Canada (Attorney General)*, 2002 SCC 57 at paras. 18 to 20.
[12] *Aquasource Ltd. v. British Columbia (Information and Privacy Commissioner*), [1998] B.C.J. No. 1927 (C.A.).
[13] [2001] B.C.I.P.C.D. No. 2.
[14] [2002] B.C.I.P.C.D. No. 38.

[20] The Commission, therefore properly withheld most of the information for which it claims s. 12 because it would reveal the substance of cabinet deliberations.

[21] One of CUPE's main arguments is that s. 12(2)(c)(ii) "stipulates that information restricted from disclosure pursuant to s. 12(1) is exempted from this restriction if the decision of the Executive Committee has been implemented."[15] CUPE notes that here much of the disputed information relates to the paramedics labour dispute. CUPE submits that because government's decisions concerning the dispute have already been implemented the "restriction in s. 12(1) can no longer apply." However, what CUPE fails to note is that s. 12(2)(c)(ii) applies only to "background explanations or analysis." Subject to my comments in the paragraph that follows, my review of the withheld information satisfies me it reveals the substance of cabinet deliberations and does not fall into the category of background explanations or analysis. It is only where the information has been in existence more than 15 years or more that s. 12(1) would not apply.

[22] There are, however, instances where information withheld in these records does not meet the s. 12(1) test. This is because the information would not disclose the proposed statutory or regulatory amendments nor reveal advice or recommendations or otherwise meet the s. 12 criteria. I have highlighted those in yellow for the Commission so they are clear as to what information must be disclosed pursuant to this Order. These passages are as follows:

Records 3 and 4

The opening lines of these records refer to the existence of the amendments but do not reveal them. These are akin to the "barebones series of subjects of agenda items, each consisting of a few words" described by former Commissioner Loukidelis in Order F08-17.[16]

Records 31, 52 and 125

Portions of these records are statements and comments that do not disclose the specific issues deliberated upon by cabinet or any of its committees.

Record 126

The first severed passage in this record is a speculative comment that does not reveal proposed legislation, regulations, recommendations or advice under s. 12.

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[15] CUPE's initial submission, para. 6.
[16] [2008] B.C.I.P.C.D. No. 30, at para. 18.

Record 172

Given that the subject line of this record is properly withheld, disclosing certain passages I have highlighted in the June 24, 2009, 1:03 PM email does not reveal the contents of the proposed legislative or regulatory amendments.

Record 176

Most of the information in the second email in this record is background information only, as described in s. 12(2)(c) and therefore not properly withheld under s.12.

Records 226 and 237

The Commission must not withhold the highlighted information in these records (the October 6, 2009 emails being identical) because it does not reveal the substance of cabinet deliberations.

[23] Where I found that s. 12 did not apply to Records 3, 4, 31, 52, 125, 126, 172, 176, 226 and 237, the Commission also made an overlapping claim that s. 13 excepted them from disclosure.

[24] **Advice or Recommendations**—The process for finding whether s. 13 of FIPPA applies to information involves two stages. The first stage is to determine whether in accordance with s. 13(1), the disclosure of the information "would reveal advice or recommendations developed by or for a public body or a minister."

[25] If it does, it is necessary to consider whether the information at issue also constitutes any of the categories of information listed in s. 13(2) of FIPPA. This subsection stipulates, "the head of a public body must not refuse to disclose under subsection (1)" any of the listed information. The applicant argues "factual information" under s. 13(2)(a) is applicable here.

Does the information withheld constitute policy advice and recommendations?

[26] This exception has been the subject of many orders, for example, Order 01-15,[17] where former Commissioner Loukidelis said this:

> [22] This exception is designed, in my view, to protect a public body's internal decision-making and policy-making processes, in particular while

[17] [2001 B.C.I.P.C.D. No. 16.

> the public body is considering a given issue, by encouraging the free and frank flow of advice and recommendations. …

[27] These orders have also found that a public body is authorized to refuse access to information, such as options and their implications, which would allow an individual to draw accurate inferences about advice or recommendations. This includes policy issues, possible options for changes to the policy and considerations for these various options, including a discussion of implications and possible impacts of the options.[18]

[28] I take this approach here.

[29] I will first consider those passages in the records where I have already rejected the Commission's application of s. 12 and thereafter will consider those passages to which the Commission applied s. 13 alone.

Records 3 and 4

These passages outline the subject of the meeting agenda in the broadest way and reveal nothing beyond what the already disclosed portion of the record show. It certainly does not disclose, or enable anyone to infer, recommendations or advice.

Records 31, 52 and 125

These records contain the same January 12, 2009 email. The portions of the records I have highlighted are factual or explanatory statements that do not disclose advice or recommendations.

Record 126

The first severed passage I have highlighted is a speculative assertion that does not reveal recommendations or advice under s. 13.

Record 172

Again, given that the Commission properly withheld the subject line of the record the highlighted portions here would not reveal any advice or recommendations.

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[18] See Order F10-15, [2010] B.C.I.P.C.D. No. 24, para. 23; Order 02-38, [2002] B.C.I.P.C.D. No. 38, paras. 102-127, and Order F06-16, [2006] B.C.I.P.C.D. No. 23, para. 48; *College of Physicians of B.C. v. British Columbia (Information and Privacy Commissioner)*, [2002] BCCA 665.

Record 176

The information highlighted in the second email in the record is background information under s. 13(a) and does not disclose any advice or recommendations.

Record 226 and 237

These are identical emails. The small amount of the highlighted information does not disclose either recommendations or advice.

[30] To summarize, the passages in paragraphs 22 and 29 are not properly withheld under s. 12 or s. 13 and as earlier stated, I have highlighted those in yellow for the Commission.

[31] I will now consider the passages that the Commission withheld exclusively under s. 13.

[32] The types of records the Commission withheld, under s. 13 in this instance, are generally of the same type identified under the s. 12 analysis above; email exchanges involving Commission and Ministry employees and briefing documents authored by Ministry or Commission employees.

Record 29

The one passage in the January 19, 2009, 11:45 AM email is a simple question revealing no advice or recommendations.

Record 30

January 19, 2009, 10:22 AM email passage is advice and properly withheld.

Record 31

The passages at issue are merely statements and none reveals advice or recommendations.

Record 32

The passage here notes someone has been the recipient of advice but does not disclose nor infer what that is.

Record 37

This passage raises a question but neither discloses nor infers advice or recommendations.

Record 38

The sentences in question disclose advice and are properly withheld.

Record 39

The passage is a simple statement that does not disclose advice or recommendations.

Record 40

Part of the passage contains advice and is properly withheld. The part that does not consists of a question and a statement of fact.

Record 41

The severed passages in the subject line of each email are directions to staff, not advice or recommendations. Further, the statement contained in the January 16, 2009, 3:22 PM email is also a statement rather than advice or recommendations.

Record 44

This is the same subject matter as Record 41 above and therefore I apply the same reasoning to it.

Record 45

The subject lines are again a direction, not advice or recommendations.

Record 48

The two s. 13 passages in the January 12, 2009, 10:12 AM email are statements referring to records. However, the passages do not reveal what those records are or what they might contain.

Record 52

These passages are the same as those in Record 39 and for the reasons expressed with respect to that record, these passages do not reveal advice or recommendations.

Record 54

This passage reflects a party consulted on the EHSA amendments but does not disclose what advice or recommendations were offered.

Record 66

This record contains a series of statements and a question none of which discloses recommendations or advice.

Record 68

This passage extends an invitation but does not disclose recommendations or advice.

Record 69

This passage contains two statements and a question none of which discloses recommendations or advice.

Record 118

These passages refer to a series of legislative options and s. 13(1) therefore applies, and they are properly withheld.

Record 127

There are four separate passages here. The first two are statements disclosing no recommendations or advice. Parts of the third passage reveal recommendations or advice, while the others are a statement and a question that do not. I have highlighted those parts that do not. The fourth passage discloses policy options and is properly withheld.

Record 152

The passage indicates the author has advice to give about the matter, but does not disclose what that is.

Records 169 and 170

The withheld passages are the same in each record. This passage refers to unspecified circumstances that do not reveal any recommendations or advice.

Record 173

There is nothing in these sentences that disclose the substance of any recommendations or advice.

Record 174

Though issues are referred to here, those issues are not identified, nor is it possible to discern recommendations or advice in this sentence.

Records 179, 181 and 182

The withheld passages in each of these records are the same. The first passage contains statements of fact and therefore must not be withheld. As to the second passage, it is my view that particular recommendations could be inferred from it and is therefore properly withheld.

Record 186

The passage infers advice and is therefore properly withheld.

Records 202 to 208

These records are recommended speaking points for a Cabinet Minister and, therefore, are properly withheld.

Record 225

The first passage indicates a direction to staff to execute a duty rather than reveal any recommendation or advice. The questions that follow also do not disclose recommendations or advice. The second passage discloses a recommendation and is therefore properly withheld.

Records 226 and 237

The same passage is found in each record and is a request and a statement that disclose neither recommendations nor advice.

Records 255 to 267

These records are the recommended speaking notes for a Cabinet Minister. They are therefore properly withheld.

[33] **Would Disclosure be an Unreasonable Invasion of Privacy?**—There are a few records where a small amount of information is withheld under s. 22. This information is found in Records 59, 191, 194, 197, 199 and 209. FIPPA requires public bodies to withhold personal information where its disclosure would be an unreasonable invasion of a third party's personal privacy. The test for determining whether disclosure would be an unreasonable invasion of privacy is contained in s. 22 of FIPPA. Under s. 57(2) of FIPPA, the burden is on CUPE to prove that disclosure of the information would not be an unreasonable invasion of third-party privacy.

[34] Numerous orders have considered the application of s. 22, for example, Order 01-53.[19] First, the public body must determine if the information in dispute is personal information. Then, it must consider whether disclosure of any of the information is not an unreasonable invasion of third-party privacy under s. 22(4). If s. 22(4) does not apply, then the public body must determine whether disclosure of the information is presumed to be an unreasonable invasion of third-party privacy under s. 22(3). Finally, it must consider all relevant circumstances, including those listed in s. 22(2), in deciding whether disclosure of the information in dispute would be an unreasonable invasion of third-party privacy.

[35] I take the same approach here.

[36] The Commission properly characterizes the withheld information under s. 22 as referring to employees who are either sick or on vacation leave. This is clearly personal information about those employees. None of it falls under the headings delineated in s. 22(4) referred to above. Further, there is a presumption its disclosure would be an unreasonable invasion of the employees' personal privacy, because it relates both to the medical condition of the employee under s. 22(3)(a) and the employment history of the employees under s. 22(3)(d). There are no circumstances that rebut this presumption or otherwise favour the disclosure of this information.

[37] Therefore I find that the Commission has properly applied s. 22 to the information in question.

CONCLUSION

[38] For the reasons given above, under s. 58 of FIPPA, I make the following orders:

1. I confirm the Commission is authorized by s. 14 to refuse access to all records for which the Commission has applied solicitor-client privilege and which are identified at paras. 12-14 above.

[19] [2001] B.C.I.P.C.D. No. 56.

2. I require the Commission to refuse to disclose the information in the records for which it has applied s. 22(1).

3. I require the Commission to disclose all of the information in the records that I have highlighted in yellow that I have found were not properly withheld under either ss. 12 or 13.

4. I require the Commission to give CUPE access to this information within 30 days of the date of this order, as FIPPA defines "day", that is, on or before February 28, 2012 and, concurrently, to copy me on its cover letter to CUPE.

January 17, 2012

ORIGINAL SIGNED BY

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Michael McEvoy
A/Senior Adjudicator

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